

**2006 STATE BAR OF CALIFORNIA ENVIRONMENT SECTION**  
**NEGOTIATION COMPETITION FACT PATTERN**

Salmon Run is – or, rather, was – a picturesque hamlet in the far reaches of Northern California, in remote and beautiful Eureka County. Situated on the banks of the wild and legendary Steelhead River and surrounded by vast acres of old- and second-growth Redwood, Fir and Cedar trees, the town of 2,300 has been home to generations of logging families and enterprises since the early 1800's. More recently, beginning in the 1950's, the town's location began to attract an eclectic mix of "newcomers" – fishers, artists, back-to-landers and, lately, telecommuters – and now its population is an amalgamation of conservatives and liberals, "blue" collar and "white" collar (or no collar at all), and conservationists and those who make their living from the land. All of these people fiercely love the town and the land, and somehow have found a way to peacefully co-exist amidst the beauty and despite their sometimes conflicting philosophies. Many families go back four generations or more, and plan to watch their children and their children's children grow up here, leave and then return again to raise another generation.

The main employer in Salmon Run is Timberline Products, Inc. (TPI), a locally-owned and family-run logging and milling operation that has cut trees and processed timber off the surrounding lands since 1850. The cut and managed lands include property owned by TPI (365,000 acres), as well as state- and federally-owned timber lands. Through selective logging and management, the company has maintained a constant supply of timber for decades, providing a comfortable living for its owners and employees. Some of the most remote company-owned timberlands have yet to be cut, and harbor some of the most magnificent old-growth Redwood and Cedar trees found in California today. These stands are considered by all to be TPI's "crown jewels," although what this means may differ depending on the person being asked. Certainly, the company's long-term plan was always to harvest over time all of its lands that could reasonably be cut.

The current patriarch of TPI is Lester Charles, a big-hearted octogenarian who, until his retirement in 1990, treated his employees like family and often could be found out in the field with his forest managers, examining the lands and the trees targeted for the next cutting. TPI under Lester had a long and good relationship with state and federal authorities, and was often touted by the California Department of Forestry (CDF) and the National Forest Service (NFS) as a prime example of responsible forest stewardship. Not everyone, of course, admired TPI. As the population of Salmon Run changed over the years, TPI increasingly came under greater scrutiny and criticism by certain of the newer citizens of Salmon Run, especially those who felt that certain stands of trees, at the least, should never be cut.

That criticism increased when Lester retired and his son, Harry, returned in 1990 from a successful career as an investment banker on the East Coast to take over the company's operations. Harry brought with him new ideas (at least to this community)

based on his business experience and plans for maximizing TPI's returns. While many at first were happy to see Harry (now "Harrison", at least to strangers) Charles return home, some quickly became dismayed by Harry's aggressive plans for cutting and selling timber, and saw dire changes coming to their way and quality of life. Still others welcomed the change, eager at the thought of improved living standards and a more streamlined company management. Under Harry, the company's timber harvesting plan (THP) filings<sup>1</sup> increased dramatically and, from 1991 through 1998, the company increased its planned harvests nearly a hundredfold, from a steady 65,000 board feet per year to 549,000 board feet per year. To fund its stepped-up operations, including new equipment and increased milling capacity, TPI began mortgaging many of its own timberlands, using its standing trees as collateral. By 1999, the company's debt, including interest, nearly equaled its returns. Yet, for those working on the ground, the increased wages and work opportunities more than compensated for the worries of the few that the company's holdings, both of its own lands and those public lands for which it held THPs, were finite, and that the rate of cutting was too aggressive for tree regrowth.

As Harry's new management filed increasingly aggressive THPs with the CDF, local environmentalists responded in kind, filing numerous objections to the plans. Very quickly, the local environmentalists formed a group, Timberline: Response of an Angry Community (TRAC), to better mobilize and respond to the company's increased logging. TRAC filed objections with the state and federal authorities, asserting that the plans would harm endangered species, increase siltation of the Steelhead River and its tributaries, and cause erosion and scarring of the steep hillsides surrounding the town. In response, TPI's biologists, geologists and foresters provided detailed support for its harvesting plans, defending the safety and compliance of the planned harvests. The CDF and Regional Water Quality Control Board for Eureka County (RWQCB) examined the proposed THPs to ensure they met applicable requirements. See Pub. Res. Code §§ 4581-4592; 14 Cal. Code Reg. §§ 1031-1052.4. While a few were found deficient and so were denied, the vast majority of THPs filed by TPI were approved, and the company's logging operations proceeded apace.

One of the THPs approved by the CDF in 2002 pertained to 350 acres on the steep mountainside directly above Salmon Run, in an area known as "Devil's Avalanche," and comprised of both company-owned and State-owned lands. A popular climbing and hiking area, Devil's Avalanche also sported numerous first- and second-growth Redwood, Cedar and Douglas Fir trees. In some places, the slope of the land exceeded 65%, but the hillside was naturally terraced in places that, according to the company's THP, would allow for access roads to be cut and tractors and cables to be located for systematic and careful tree felling. The company's approved plan called for cutting the areas of steepest slope over three years, beginning in the summer of 2002 and finishing in

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<sup>1</sup> THPs are plans that, with certain exceptions not applicable here, must be submitted to and approved by CDF by landowners or timber harvesters before they can log trees on State, local or private property within the State of California. See Pub. Res. Code §§ 4581-4592; 14 Cal. Code Reg. §§ 1031-1052.4.

2004. The THP committed the company to replant the area after each cut, to help stabilize the slope and minimize erosion.

The Devil's Avalanche THP brought the most protests, and resulted in an unprecedented combination of people finding fault with the company's plans. Of course, there were the environmentalists, represented by TRAC, citing (among other things) destruction of habitat for migrating birds, and probable siltation of the Steelhead River. Cf. Lake Madrone Water Dist. V. State Water Resources Control Bd. (1989) 209 Cal.App. 3d 163, 167-170 (silt is a natural substance "which, in its unconcentrated form in a creek is innocuous," but when concentrated by human activities, becomes "deadly to aquatic life" and constitutes a "waste" under California law). Then, there were the recreationists, including fishing operations located in Salmon Run whose very livelihood depends on the clear, fast-running waters of the Steelhead River required for the abundant salmon that attract fishers from far and wide. Cf. People v. Guntert (1981) 126 Cal.App.3d Supp. 1 (permanent annihilation or displacement of fish or wildlife is not required in order to show violation; rather, plaintiffs must show a harmful effect on fish, plant, or bird life). Most unusual for this particular THP were the concerns expressed by a retired TPI forester, Morris (Mory) Kramer, an otherwise company loyalist whose keen eye and long years of experience told him that road-building and tractoring steep slopes in the watershed directly above the town was a risky proposition at best, and, unless carefully and expertly handled, could jeopardize the town itself.

All of these interests and more filed protests with the CDF and RWQCB regarding the proposed Devil's Avalanche THP. Several hearings were held, and numerous studies were required, before the CDF and RWQCB felt satisfied that the geological and biological studies provided by TPI adequately addressed the townspeople's concerns. Pub. Res. Code § 4582.9; 14 Cal. Code Reg. §§ 1056-1056.6. The studies and hearings included extensive evaluations and plans for the access roads to be cut across State lands to areas to be harvested; however, neither the CDF nor the RWQCB independently evaluated the area targeted for road-building or cutting, and they relied heavily on the reports and conclusions of TPI's experts in issuing their approval. See Pub. Res. Code § 4582.9(b). No one was entirely happy with the final THP. TPI felt it had agreed to many unnecessary mitigation requirements, including providing special mesh covering of cut areas on the steepest slopes at the end of each cutting season. The environmentalists felt that the concessions made by the company were inadequate to justify the scarring of the hillsides and cutting of the old-growth trees. The fishers feared the loss of tourism in an area that would be visibly scarred by the roadbuilding and cutting, which was also likely to increase siltation and temperature in the Steelhead River and potentially harm their business. And old Mory continued to have misgivings about the adequacies of TPI's geologic studies, but figured that the scientists and the CDF knew more than he did about the issue.

The roadbuilding was completed and cutting of Devil's Avalanche began in the summer of 2002, soon after the THP was approved. That fall, the company replanted as required and placed the mesh covering over the steepest cut slopes. The rains came heavily that winter, but the hillside seemed to hold, and cutting recommenced as soon as

the skies cleared the following spring. The cut area was replanted again in the fall. Winter 2003 brought another heavy rainy season. In the spring of 2004, Mory Kramer noticed unusually high gravel residue in the creek behind his house, which was a tributary to the Steelhead River. He called the chief forester for TPI, who came out to look at the run-off. The forester assured him that the gravel could not be related to TPI's cutting in the hills above the town, as the mitigation measures were fully in place and the company was in full compliance with the requirements of the THP. TPI's forester suggested other possible causes of the gravel run-off, such as increased use of fire roads (and illegal cut trails) above the town by recreationists using all-terrain-vehicles (ATVs) and loss of trees on state- and federal-controlled forests in nearby areas due to disease unrelated to TPI's harvesting. Mory asked if the state regulators had been out to inspect the company's logging practices. TPI's forester stated that they had conducted one inspection in the summer of 2002, but confirmed that they had not been out since.

The logging at Devil's Avalanche finished in the summer of 2004, in accordance with TPI's THP. That winter marked the third year of unprecedented winter rains. In January 2005, the hillside above the town gave way, and a wall of mud ten stories high descended on the town. It was the largest mudslide in the history of California, and it virtually buried the town of Salmon Run. Fortunately, few lives were lost, but houses and businesses were wiped out (including Mory Kramer's), some completely swept away in the slide. A full 60% of the town was completely destroyed, and even more homes and businesses were made inhabitable. The Steelhead River was completely blocked by the debris and the artificial lake now damming up behind the debris both threatened what remained of the town and promised to destroy the spring salmon run. The cost of recovery, restoration and rebuilding was estimated in the hundreds of millions of dollars for those things that could be replaced or repaired. The townspeople were devastated and angry, and, while it was not clear to what extent the slide was caused by the cutting or the roadbuilding (or what combination of the two), many were convinced that those two activities were the major factors in creating a slide so massive it effectively destroyed Salmon Run. Even company loyalists felt they had been misled by TPI's and the State agencies' assurances that the mitigation measures put in place for the harvest would be sufficient to protect their town and their lives.

Between June and September 2005, lawsuits were filed against the State (for the CDF and RWQCB) and TPI, by TRAC, the town of Salmon Run and several individuals and businesses in the area. Among other things, such lawsuits allege negligence on the part of the State in approving the Devil's Avalanche THP, and in particular recklessness in approving the roads cut across the steep State lands. The lawsuits also allege negligence, gross negligence, nuisance and fraud against TPI for the damages to the town and surrounding environment. In October 2005, the Superior Court for Eureka County, in which the cases were filed, consolidated the cases filed against the State and TPI.

While many in Salmon Run doubt that their old way of life can ever be restored, the community of Salmon Run seeks an admission of responsibility and compensation from the State of California and TPI for the destruction of their town and the Steelhead River. They believe that the studies conducted by TPI and relied upon by the State were

inadequate to fully assess the risks to the town and the Steelhead River, see Pub. Res. Code §§ 4562.5, 4582.71(a); 14 Cal. Code Reg. §§ 916-916.12, and that TPI misled the townspeople in its assurances that the logging would not jeopardize the town. They feel the State was too quick to rely on TPI's assurances and should have required far more from TPI, both in terms of studies and reclamation requirements (including bonds) to ensure the safety of the timbering operations. They also feel the State is complicit in the fact that the roads accessing the harvesting area, also implicated in the slide, were cut across State lands with the State's negligent blessing. The community believes it will need \$120 million to rebuild the town of Salmon Run itself, and an additional \$30 million for grant or loan seed money to reestablish the town's businesses. Additional monies will be needed to restore the Steelhead River and restock the fishery, and to reclaim Devil's Avalanche and the slide area below it.

Although the State agrees that the likely cause of the destruction is the logging of Devil's Avalanche, it believes it is immune from liability based on the doctrine of sovereign immunity (see generally Gov't Code § 818.4; but cf. Locklin v. City of Lafayette (1994) 7 Cal.4<sup>th</sup> 327). The State believes that it reasonably relied on the studies provided by TPI, and believes that any inadequacies in the THP were due to inadequate information (or misinformation) from TPI. Nonetheless, because of its public responsibilities, and its role (even if not directly liable) in the tragedy, the State has agreed to meet with the townspeople to discuss their concerns and determine what procedures may be necessary both to restore the town and to protect its citizens and the Steelhead River in the future.

TPI believes that its logging operations at Devil's Avalanche were not the cause (or, at least, not the sole cause) of the slide. It also believes that the State's approval of the Devil's Avalanche THP should shield it from liability based on alleged inadequacies in the company's pre-harvesting studies. The company also believes that, if the State's approval does not provide TPI with a liability shield, the State then should be equally culpable for any liability that the company may have as a result of the timber harvesting the State authorized at Devil's Avalanche. At the same time, TPI is realistic, and realizes that initial appearances do point to Devil's Avalanche as a probable cause of the destruction of Salmon Run (although it believes the three years of unanticipated and unprecedented rainfall, combined with other activities on the state and federal lands in the area, including the increased recreational uses of those lands, caused, or at least greatly exacerbated, the erosion). Further, many of TPI's employees' lives were shattered by the slide and, at the insistence of Lester Charles, Harry has agreed that TPI would meet with the townspeople, if only as a gesture of goodwill. Harry also recognizes that the cost of a full-blown trial, and the possibility of a significant judgment against it, could easily bankrupt the company, given the company's current debt load. On the other hand, if TPI were to assume the entire costs of the cleanup, it would surely put the company out of business and put many of the townspeople out of work, as well as out of their homes.

Two meetings have been set up between representatives for the plaintiffs, and the State and TPI. In Round 1, the plaintiffs will meet with the State to address the State's alleged liability for the town's destruction as a result of its approval of the Devil's

Avalanche THP, and to also address restoration of the Steelhead River and Devil's Avalanche itself. In Round 2, the plaintiffs will meet with TPI to discuss the townspeople's allegations that TPI is responsible for the mudslide, and should finance the rebuilding of the town and restoration of the surrounding environment.<sup>2</sup>

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<sup>2</sup> The State and TPI share an interest in avoiding or minimizing their respective liability, but their interests are at odds with respect to many of the matters in issue. Therefore, the State and TPI certainly would have different counsel in this matter. For purposes of this exercise, however, counsel will represent the State and the TPI, respectively, in the first and second round of the negotiations, without reference to any ethical dilemmas. In each round, you should represent your client vigorously, without regard to any potentially conflicting positions this might theoretically present for your "other" client.

By the same token, the various factions within the community also could be at odds with respect to some of the matters in issue and would likely have separate counsel. For purposes of this exercise, however, counsel will represent the community interests as a whole, including those of TRAC, throughout the negotiations, without reference to any ethical dilemmas.